

Approved 9/4/08

**TOWN OF CUSHING
PLANNING BOARD
Minutes of Meeting
August 7, 2008**

Board Present: Chairman Dan Remian, David Cobey, Bob Ellis, Evelyn Kalloch, Frank Muddle, PB Attorney Amanda Meader and CEO Scott Bickford

Absent: None

1.Call to Order: Chairman Remian called the meeting to order at 6:30 P.M.

2. Approve the Minutes of 7/2/08: Mr. Ellis noted that the last sentence of the 3rd Paragraph on Page 3 was not a complete sentence and asked Mr. Remian what he had said. Mr. Remian said the sentence should read, "Mr. Remian said it was a Board decision, not his."

ACTION: Mr. Ellis made a motion, seconded by Mr. Cobey, to approve the minutes of the 7/2/08 meeting as written and corrected.
Carried 5-0-0

3. Correspondence: Chairman Remian said the Board had received a letter, dated 8/6/08, from James Tower, which the chairman read aloud. Mr. Tower had written that neither his attorney nor surveyor could attend tonight's meeting and asked that it be postponed until the second week of August. Mr. Remian noted a response from Mr. Bickford and two letters from Bonnie Miller, one in regards to the landing and one to Robbins Mountain Subdivision [RMS].

4. Old Business: Mr. Tower said he had two items and distributed copies of correspondence to the PB members. He stated that this was an attempt to put some things in order that he felt needed to be addressed. Mr. Remian asked the Board to set a time limit to this discussion because there was a lot of material just given to the Board and, at first glance, some of it appeared to be repetitive. Mr. Tower read aloud a letter he had written asking the PB to disqualify Board members Kalloch and Remian from reviewing and/or deliberating on applications submitted by him. He listed reasons why he felt the two members had a bias against him. Mr. Remian interrupted him to say this accusation had been addressed several times. Mr. Tower continued to speak, referring to a "new" letter from his attorney, Edward Bearor.

Mr. Remian stopped Mr. Tower again and said if he had a specific request the Board would act upon it, but it was not necessary to rehash this issue. Mr. Tower said he wanted this letter to be put into the record; several members said it already was. Mr. Remian asked the developer if he had a request and Mr. Tower replied that he requested to read this letter into the record. The chairman responded that the PB's attorney had settled the question of bias. Mr. Tower said he was not aware of that; in fact, he said, he recalled Mr. Remian quoting Attorney Cunningham as saying it was not worthy of a response. Board Attorney Meader said she was familiar with the letter and if Mr. Tower wanted to ask the Board to take a vote as to whether to have the letter read into the record he could. In addition, Ms. Meader said she would be willing to discuss case law concerning bias if the Board so desired; otherwise, she felt the Board should move forward with the items on the agenda. Mr. Ellis said the PB's manual directed the Board to take a vote, which it had done in the past, whenever bias was alleged. Mr. Remian asked if Mr. Ellis would like to do that now or let the Board's previous votes stand. Mr. Muddle said this seemed redundant as the Board had taken this up and voted on it more than once. Mr. Ellis responded that, even though it was redundant, the request to address it should be met.

ACTION: Mr. Ellis made a motion, seconded by Mr. Cobey, that we take a vote on whether there exists any bias with members Remian and Kalloch.
Carried 5-0-0

As Mr. Remian tried to move on to the next item on the agenda, Mr. Tower stated that he had another item he wanted to discuss. Mr. Remian said he would allow the developer to speak, but would allow all speakers no more than five minutes, unless the Board decided it would like to extend the time limit for a speaker.

Mr. Tower said he had submitted an application for Rock Coast Outfitters, at which time there was an attempt to limit the time of presentation. He said the applicant was obligated to provide the burden of proof and, though case law said time limits could be imposed upon others, there was no provision for such a limit on the presenter. Ms. Meader stated that, while an applicant had the right to a hearing, there was nothing that instructed that an applicant could speak for an unlimited amount of time. In fact, she said, there was case law that suggested beyond a certain point the applicant did not have the right to speak without limitation. Ms. Meader said she was sure the applicant would be given the time to make any new points, but it was not open-ended. Mr. Remian noted that the issue Mr. Tower wanted to discuss was not on the agenda and he wanted no more disruptions to the meeting. Mr. Tower requested that the reconsideration of the RMS denial be tabled because his attorney, who had some documentation requested by the Board, could not attend.

Mr. Cobey said it was his understanding that the Board had asked for information on the DEP storm water review, financial backing and the border issue with the abutter. Mr. Ellis said he felt that the two latter issues had been resolved, leaving only the storm water issue. Mrs. Kalloch said there had been significant changes to the plan, stating that almost every lot had been changed. Mr. Cobey said his point was that the Board had everything it had requested, so he felt it could move ahead with reconsideration. Mr. Muddle felt the third question, storm water runoff, had now been answered in an extensive document from the DEP, completing the receipt of requested information. Mr. Ellis clarified that he had not meant to imply that the Board had solved the border issue, but rather that it was outside the purview of the Board, which was not anticipating further information in that regard. He noted that the surveyor's stamp was now on the plan. Mr. Ellis remained concerned that, at the last meeting, it had been stated that the DEP storm water approval would be based on the new plan submitted. He stated that PB review was based on a November plan, while another plan had been submitted in April and perhaps a third between these two. He now had no idea what the DEP had reviewed. He concluded that a new application was warranted due to this confusion, along with other member's assertions that contradictory and confusing submittals had been received. Mr. Cobey said he did not disagree, but he felt the Board had the basis to reopen reconsideration of the denial in order to base its decision on the applicant's failure to demonstrate right, title and interest in the property of the proposed subdivision. He said it was clear from the MMA manual that said in case of boundary disputes the Board could choose to table action or deny approval on the basis that the applicant had failed to meet the burden of proof. Mr. Muddle said he was confused because the latest drawing showed the property line moved out of the disputed area and questioned whether Mr. Tower had provided credible data to prove that he owned the property on which the subdivision was now outlined. Mr. Cobey responded that Cardon's survey contradicted Mr. Tower's. Mr. Cobey then made a motion to reopen reconsideration of the Board's denial of the RMS application. In response to this motion, Mr. Remian said the Board could vote to reconsider but, since reconsideration was not on tonight's agenda, could not actually reconsider until next month. Ms. Meader confirmed this.

ACTION: Mr. Cobey made a motion, seconded by Mr. Ellis, to reconsider denial at the next meeting.
Carried 3-2-0 (Mrs. Kalloch & Mr. Remian voted against)

Mr. Cobey asked permission to circulate some proposed findings, which were all statements of fact. Ms. Meader stated that this material would be nothing more than suggested reading material that may or may not be utilized. Mr. Ellis said the last three meetings had consisted of discussion of procedural considerations of how to handle reconsideration of the denial. If the motion passed, the Board would end up doing a partial review because some of the criteria had already been approved. He asked Ms. Meader if such reconsideration would be limited to the deficiencies cited before denial or would there be latitude to consider all criteria. Attorney Meader said the latter would be the case and cited a law court decision on this question. Mr. Ellis then said if the Board stood behind its denial, the applicant would have the opportunity to start with clean submittals, thus removing the ambiguity. Mrs. Kalloch said she felt that would be beneficial to all parties. Mr. Muddle posited that such an avenue would require a new DEP review, but the CEO said the DEP approval ran independently of what the Board approved. Ms. Meader added that Mr. Tower could meet with the DEP to discuss any plan changes.

Mr. Tower said he had prepared two series of documents designed to address what had subsequently occurred here tonight. He said he had heard the Board say it was uncertain what was before it, which was understandable. He had not brought the documents tonight because his attorney had them and they had thought until Monday that the meeting would be held on the 6th, not the 7th. He said the first set of documents was a list of correspondence and submittals, giving a concise definition of what was before the Board, while the second set was a series of drawings with transparent overlays that demonstrated that the subdivision plan had been moved off disputed land. Mr. Tower said the inability of his attorney to attend was the reason he had asked that this item be tabled. Mr.

Bickford said that he had mailed and faxed a copy of the meeting agenda, with the meeting date, to Mr. Tower on July 16th. Mr. Remian said the date change had also been discussed at the last meeting.

Mr. Ellis asked what the advantages would be to Mr. Cobey's motion. Mr. Cobey said he felt the DEP had required a number of buffer areas to be defined later this month and he felt they affected the storm water plan. He continued that the storm water plan of November 2007 was not based on the lots on the plan of June 12th. In addition, he cited erroneous information on Lots 85 & 86. He said there were several differences between the plans and suggested members think about them before the next meeting. Mr. Cobey said he was interested in what Mr. Tower would say about there being no conflict on the subdivision boundary. Mr. Ellis said it would do the Board good to go to Augusta for a copy of the DEP submittal to determine which drawing and plan of the lots across the street it had reviewed. He offered to go pick them up. Mr. Cobey suggested that comparison of the documents might best be handled at a workshop meeting.

Mr. Tower said the transparencies he had prepared echoed those before both the town and the DEP. Mr. Ellis said he was concerned because both the developer and his attorney had told the Board that the plan sent to DEP mirrored the latest plan the Board had received, yet the dates did not support this contention. Mr. Bickford questioned whether the motion on the table was the correct approach. Mr. Cobey said he thought the three issues delineated at the time of denial were the only ones he would wish to review but Mr. Ellis said he intended to review other things, as well. Mr. Cobey stressed that the Board should not consider at its next meeting any submissions that had not been presented 15 days prior to the meeting. Ms. Meader said, considering the length of time this matter had continued, the Board might like to add to the motion very clear instruction for Mr. Tower as to what items it wanted to see and that the application would be voted up or down at that meeting. Mr. Cobey said he would like the developer to respond to the questions he had distributed this evening. Mr. Muddle wanted to review the evidence to prove title to the property in the drawing. Mr. Ellis stated that the submission of this new plan opened up review of the standards, at least as dealt with lot size. Mr. Muddle said he felt removal of the denial would render any part of the application fair for review. Ms. Meader stated that, though guidance should be offered to Mr. Tower, Mr. Ellis was correct that no issue should be off the table.

Mr. Tower referred the Board to particular pages he had distributed in relation to the boundary issue. He said he had never provided any evidence regarding the boundary because he felt it was not an issue to be decided by the Board. Mr. Cobey made a motion that the Board hold a workshop for comparison of plans and boundary lines, not less than 10 days before the next meeting. The chairman said that would be discussed at the end of the meeting.

5. Robbins Mountain Landing, Land Use Application, Last Resort Holdings, LLC, Map 5, Lots 85 & 64: The chairman said there was a request to waive the fee while the CEO held a \$200 check in escrow. Mr. Ellis asked the status of the appeal on the earlier application for these lots and was told it had been withdrawn. Mr. Tower said the DEP had reclassified the drainage ditch on the property to a stream and referred the Board to Page 63 of the booklet of documents he distributed earlier. He read aloud a letter he had sent to Mr. Bickford concerning the wetlands on Lots 85 & 86, as support for his argument that this was simply a reiteration of that earlier application. He said Cushing's Shoreland Zoning Ordinance [SZO] appeared to allow multiple land use permits for the same parcel of land. Mr. Muddle said the previous application was disapproved and the appeal withdrawn, so this was a new submittal. Ms. Meader confirmed that this was a new application. Attorney Meader asked the date of the application and Mr. Remian said it was dated 6/19/08 (received by the town on 6/25/08).

ACTION: Mr. Cobey made a motion, seconded by Mrs. Kalloch, that we do not waive the application fee.
Carried 5-0-0

Mr. Cobey stated that Mr. Tower had said that no disturbance was allowed within 25' of a stream without a stream alteration permit, with a Permit By Rule required for activities between 25' and 75'. While the developer had shown a setback of 25' from the stream, Mr. Cobey said the SZO stated that roads and driveways must be set back 75' from the normal high water line, etc. He said a 75' setback would be at the edge of the wetland shown so (without PB permission) parking and driving would not be allowed between the wetland area and the stream. Mr. Cobey said there should be delineation of the marsh mentioned in a 5/6/08 Normandeau letter because if it existed it was a Resource Protection [RP] district, which would prohibit clearing within 250'. Mrs. Kalloch noted that the wetland area designated on this map was different from that on previous maps. Mr. Remian said Mr. Tower had acknowledged errors in the wetland designation and Mr. Cobey said the PB would have to assume that the latest plan was up-to-date in that regard. Mr. Ellis asked if Mr. Cobey's argument would prohibit the position of the parking area and the path. Mr. Cobey said that was true of the requirements of the SZO Subsection 15 (G)(2). If a marsh

existed, that would create an RP district, surrounded by a large area where clearing for development was prohibited; there was also the question of coastal wetland.

Mrs. Kalloch said she had nothing noting the length of the walkway, size of the parking lot or length of the ramp to the float. Mr. Remian said he also saw no IF&W report saying this was not a habitat area; he believed it was a roosting and feeding area. Mr. Ellis asked if the Board could address any deficiencies of the application and then request submittals that would make it complete. The chairman agreed and asked for a listing. The members listed the 75' setback from the stream, the marsh delineated and identified, delineation of the coastal wetlands above elevation 6.5, the IF & W report, dimensions of the float and ramp, size of the parking lot, a map or aerial photo showing the extent of intrusion into the tidal zone and a drawing encompassing the entire area (including boundaries with abutting properties and the position of the float). Mr. Cobey said a letter from Becky Maddox seemed to address the IF & W issues and the chairman asked that it be included with the application.

Mr. Bickford asked if Mr. Tower had an application with the DEP for the pier and if the bio retention cell would be handling just the runoff from the parking lot. Mr. Tower responded that the bio-retention cell was a storm water treatment mechanism for water from the parking lot. He said no pier was requested; there were simply a ramp and a float, which required no permits as long as they were seasonally installed. He added that there were no wetlands in Cushing rated at moderate or high value, but Mr. Cobey said that did not include the salt marshes. Tim Hanson asked if the Board was reviewing for completeness because he felt the application was not complete and that should end the discussion. He also recommended that the applicant flag the boundary lines and setback limits so the Board could walk the site. The Board said it had walked the site, but perhaps it should be done again because the wetlands rules had changed.

Mr. Tower referred the Board to Page 92 of the documents he had presented tonight, which he said demonstrated that it was the CEO who determined the completeness of an application. He said this application had been so determined, though the Board could request additional information. The chairman responded that the Board was trying to clarify deficiencies for Mr. Tower. The CEO said the receipt on Page 92 simply confirmed that a completed town application form, right or wrong, had been received.

Ms. Meader inquired as to the intended use of the retained land. Mr. Tower said he did not believe the ordinance required a definition of use. Mr. Muddle asked if no definition of use meant the area would be open to the public. Mr. Tower responded that it would not be open to the public. Mr. Muddle said that, in that case, he would like to know the restrictions on the property. The developer stated again that it would not be open to the public. Mrs. Kalloch asked if there would be covenants and Mr. Tower said there would not. Mr. Ellis commented that Cushing's ordinances did not require any explanation of the proposed use of retained land for a land use permit under the SZO. Ms. Meader said this discussion would be more appropriate during the application review. Mr. Cobey stated that the Table of Land Uses required PB action on public and private recreation facilities and he felt it pertinent to know whether the Board was discussing public or private uses.

ACTION: Mr. Ellis made a motion, seconded by Mrs. Kalloch, that the Board provide the applicant with the deficiencies noted in a letter and table the application until those submissions were received.
Carried 5-0-0

CEO Bickford asked for clarification that the Board's was suggestion of submission of these items did not imply that these items would complete the application. Mr. Remian said that was correct and this was not substantive review.

6. At the Request of James Tower, a Shoreland Boundary Change, Reference 16 (B)(2) and 10(D): The chairman said he had no drawings on this and felt this was a discussion item to point Mr. Tower in the right direction. Mr. Ellis said the current SZO assumed that the section addressing a request for two land uses on a lot was to, or just to delineate in Mr. Tower's case, RP due to slopes in conjunction with a land use permit. [Sic] He said it was never anticipated that an applicant would come forward just to establish slope areas; therefore, there was no provision in the SZO to have this done without an application for land use. He said the ordinance required that the town vote on, and the state approve, such a request. Mr. Ellis suggested some recommendation on Mr. Tower's drawings before the town voted on it. He elucidated that the procedural part of the SZO was wrong and that, in order to avoid getting an approval from the townspeople and later having it come before the PB and be denied, he thought the applicant would want at least a letter of approval from the PB stating that it corresponded with the standards. Mr. Tower said this was precisely why, despite being told two or three times to take this somewhere else, he thought it was the PB's duty to do that. Mr. Ellis asked Attorney Meader her opinion and whether the PB should have an agreement with the applicant that that was the correct procedure, because it was in

conflict with the language of the ordinance to review this before the town vote. CEO Bickford stated that he had two maps received by the Town Clerk on 6/21/08 and said the end result would be that the PB would call for a Public Hearing to discuss this land use change in the SZO. Consequently, he agreed with Mr. Tower that it had to go to the Board before it could go to the public for approval. He said he did not know how to get around the town's ordinance that placed the Board in this position, so he would defer to the PB attorney.

Ms. Meader said there was value in trying to come to a common understanding between the Board and Mr. Tower. Mr. Cobey clarified for the attorney that Section 10(D) was the problem; he read aloud from this section. Mr. Ellis said that section was fine, but the conflict arose in Section 16(B), which prohibited review. There was discussion of the interpretation of these sections. Ms. Meader failed to see the conflict and felt the Board and Mr. Tower could work through this boundary issue in a vacuum, without respect to any application regarding uses on these lots. Mr. Cobey said the Board needed to satisfy itself that this had been done as required under Section 10(D, P, F & G), which would require having the information submitted in the scale of the SZO map.

Mr. Cobey asked Mr. Tower if the two maps presented were the only ones for which he currently sought revision to the steep slope areas. Mr. Tower said he thought so. Mr. Ellis asked what would be the end result if the PB worked with the applicant on Section 10 and came up with a procedure to do this. Mr. Cobey said the result would be a change of the outlines of the RP areas on the SZO map. Notice would then be posted for a zoning map amendment hearing, the result being sent to the DEP for the Commissioner's approval.

Mr. Remian asked Mr. Tower to provide a couple more drawings and the developer said he could after the Board told him what scale it wanted. Mr. Cobey said the scale was 200* and suggested the drawings be reviewed at a workshop. Mr. Bickford asked if a surveyor must execute the drawings or if an engineer's drawing would be adequate. Mr. Ellis said Section 10 required a licensed surveyor's drawing.

7. New Business: Mr. Remian said he had a couple of books on the Freedom of Access statute if anyone wanted a copy. Ms. Meader said there would also be training on this at the MMA convention in October.

The workshop for the review of the RMS drawings and the shoreland map was scheduled for 8/27/08 at 4:00 P.M. The next regular meeting would be 9/3/08.

8. Adjournment:

ACTION: Mrs. Kalloch made a motion, seconded by Mr. Ellis, to adjourn at 8:21 P.M.
Carried 5-0-0

Respectfully submitted,

Deborah E. Sealey
Writing Secretary

* At the 9/4/08 meeting Mr. Cobey corrected this figure to be 500